N.W. Bernstein & Associates, LLC

800 Westchester Avenue, Suite N319 · Rye Brook, New York 10573 · (914) 358-3500 · Fax: (914) 701-0707

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Via electronic mail and Federal Express

Richard J. Hackley, Chief
Program Accounting and Analysis Section
United States Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3590

Thomas J. Krueger
Associate Regional Counsel
United States Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3590

Matthew Ohl
Remedial Project Manager
United States Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3590

Re: Effort to Resolve Informally a Dispute Regarding EPA's Bill for Third Site Costs for the period November 6, 2019 through November 5, 2020
Bill #: 2752126S0030

Dear Mr. Hackley, Mr. Krueger and Mr. Ohl:

Pursuant to Sections VII.E. and VIII. of the 2002 Third Site Administrative Order on Consent (the "Consent Order"), please be advised that there is a dispute regarding the EPA oversight costs bill in the amount of $139,960.25 dated January 13, 2021, for the period November 6, 2019 through November 5, 2020. This is an effort to resolve that dispute informally pursuant to Consent Order Section VIII. The details as to computational matters and a description of activities performed by the subcontractors are contained in Attachment 1 and described in more detail below.

1. The 2002 Consent Order

Courts construe consent orders as contracts. *U.S. v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975) ("Since a consent decree or [consent] order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper,

as with any other contract."); *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682, 691 (7th Cir. Sept. 25, 2014) ("The question whether NCR has resolved its liability to the government through the consent order—and thus is limited to section 113(f)—is a matter of contract interpretation."). In *Bernstein v. Bankert*, the Seventh Circuit applied the principles of contract interpretation to the Third Site 2002 Consent Order – the same Consent Order under which EPA is seeking to recover their oversight costs. 733 F.3d 190, 207-15 (7th Cir. 2013), *cert. denied*, 571 U.S. 1175 (2014).

Section VII of the Consent Order provides that EPA may bill the Trust on an annual basis for its oversight costs. EPA Region 5 Acting Director Douglas Ballotti' s Written Decision of May 3, 2018 clarified which costs may be billed to the Trust, and which costs may not:

> "Oversight costs" are all costs . . . that the United States incurs in reviewing or developing plans, reports and other items pursuant to this order. "Other items" are like plans and reports: documents. . . The costs incurred in preparing annual Itemized Cost Summaries for this Site . . . are "oversight costs.". . . The costs incurred preparing reports about field observations are "oversight costs." The costs incurred in the field observing work and providing supervision are not "oversight costs." The costs incurred to travel to or from the Site are not "oversight costs."

On December 12, 2016, the Consent Order was amended to authorize the use of Electrical Resistance Heating ("ERH") to treat Third Site. The Amendment created an exception to the general rule that EPA is not entitled to recover costs for field work by expanding the definition of "oversight costs" to include "ERR-related costs not inconsistent with the NCP."

In the below, we apply the Consent Order as amended December 12, 2016, and the May 3, 2018 Written Decision to the subject invoice. The Trustees also do not waive other defenses as set forth below.

Army Corps of Engineers ("AOE") Field Oversight Charges

A large portion of the AOC's vouchers consists of charges relating to oversight costs. In fact, several of the AOC's invoice narratives specifically state what portion of the invoice is related to field work, however, these oversight charges were not deducted from the January 13, 2021 oversight costs bill. Accordingly, the following field work-related charges from the AOE are disputed by the Trust:

Voucher 33122596 partially consists of field oversight of the "winter 2019 water sampling event" which occurred during the week of December 9, 2019. The ACE charges for December 9, 2019 are $123.32, and the field oversight travel charge was $851.04, for a total of $974.36.

Voucher 33123067 partially consists of $982.98 for the "annual site inspection" on January 22, 2020, and $113.68 for oversight travel expenses. (total $1,096.66).

Voucher 33124015 partially consists $3,109.24 in field oversight costs relating to the surface and subsurface water sampling event during the week of March 9, 2020.

Voucher 33125847 partially consists of ARC's field oversight of the pump and treat progress water sampling event conducted during the week of June 8, 2020. ARC's field oversight and travel expenses related to that event in are $4,099.09.

Voucher 33126423 is primarily $13,236.12 of expenses relating to field oversight of the DNAPL containment area sampling.

Voucher 33124889 includes $4,022.17 in field oversight of the DNAPL containment area sampling.

Voucher 33124971 includes $1,569.63 in field oversight travel-related costs.

Voucher 33127285 includes $3,258.38 in field oversight relating to the DNAPL containment area sampling.

Voucher 33125941 includes $8,255.18 in field oversight costs relating to the Phase 2 sampling in the DNAPL Containment Area.

Vouchers 33123549 in the amount of $4,461.16 and voucher 33121564 in the amount of $1,092.58 do not appear to include charges for field work, and are not disputed by the Trust.

Although EPA is entitled to recover the costs of "reviewing or developing plans, reports and other items pursuant to this Order," field oversight costs are not recoverable by EPA. Accordingly, The Third Site Trust Fund disputes a total direct costs of $39.620.83 of the above listed AOC invoices, and the associated indirect costs of $31,557.99, for a total of $71,178.82.

EPA Payroll

The Third Site Trust Fund disputes payroll charges for Matthew Ohl for pay periods 2021-01 and 2021-02 in the sum of $1,319.06 (direct costs) and $1,050.63 (indirect costs) as this work was performed outside of the current billing period. The total direct and indirect costs disputed are $2,369.69.

Other Defenses

1. Reasonableness Limit on EPA's Recovery Authority

Additionally, the outer limit of EPA's recovery authority is all costs "not inconsistent with the national contingency plan" CERCLA § 107(a). *See United States v. E.I. Dupont De Nemours & Co. Inc.,* 432 F.3d 161, 179 (3d Cir. 2005) (costs that are unnecessary and excessive in light of the NCP should be disallowed); *United States v. Dico, Inc.*, 266 F.3d 864, 879 (8th Cir. 2001). CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A), states that the government may recover from responsible parties "all costs of removal or remedial action ... not inconsistent with the [NCP]." Therefore, "the statutory language itself establishes an exception for costs that are inconsistent with the NCP . . . ." *United States v. Northeastern Pharm. & Chem. Co., Inc. (NEPACCO),* 810 F.2d 726, 747 (8th Cir. 1986).

The NCP itself requires EPA to take the reasonableness of cost into account by requiring that EPA action be cost-effective. *See* 40 C.F.R. §§ 300.430 (a)(1)(iii)(E); (e)(7)(iii); (f)(1)(i)(B); (f)(1)(ii)(D); (f)(5)(ii)(D). *See also United States v. Outboard Marine Corp.,* 789 F.2d 497, 506 (7th Cir. 1986) ("[t]he national contingency plan… requires that the remedial action taken by the government be cost-effective."); *United States v. Chrysler Corp.*, 168 F. Supp. 2d 754, 765 (N.D. Ohio 2001) ("the NC Plan requires that remedial action measures be cost effective"). Accordingly, duplicative, unnecessary or excessive costs are "inconsistent with" the NCP. *See United States v. E.I. Dupont De Nemours & Co. Inc.,* 432 F.3d at 179; *United States v. Dico,* 266 F.3d at 879; *United States v. Chromalloy Am. Corp.,* 158 F.3d 345, 352 (5th Cir. 1998); *United States v. Chapman*, 146 F.3d 1166, 1176 (9th Cir. 1998).

With respect to the recovery of its costs at both the ECC Site and Third Site, EPA has taken the common position that there is no standard of reasonableness applicable to EPA's "oversight costs" and has interpreted CERCLA § 107(a) to mean that the Trustees of the ECC Site and Third Site Trust Funds can only challenge the selection of response actions at those Sites as "inconsistent with the national contingency plan". For example, in EPA's April 5, 2012 letter in regarding prior ECC Site and Third Site disputes, EPA stated: "To establish that an EPA response action is inconsistent with the NCP, PRPs must show the EPA acted arbitrarily and capriciously in choosing the response action -- not the individual response costs." (Emphasis in original.)

EPA's position has been undermined by three recent U.S. Supreme Court cases—*City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863 (2013); *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014); and the U.S. Supreme Court's November 25, 2014 grant of certiorari in *Nat'l Mining Assoc. v. EPA, Michigan v. EPA*, and *Util. Air Regulatory Group v. EPA*.

In *City of Arlington, Tex. v. F.C.C.*, the U.S. Supreme Court applied a standard of agency reasonableness to deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), stating:

> Under *Chevron,* we presume that when an agency-administered statute is ambiguous with respect to what it prescribes, Congress has empowered the agency to resolve the ambiguity. *The question for a reviewing court is whether in doing so the agency has acted reasonably* and thus has 'stayed within the bounds of its statutory authority.'

133 S. Ct. at 1868 (emphasis added).

In *Util. Air Regulatory Group v. EPA*, the Court again repeatedly emphasized that an agency's actions must be reasonable:

> Under *Chevron,* we presume that when an agency-administered statute is ambiguous with respect to what it prescribes, Congress has empowered the agency to resolve the ambiguity. *The question for a reviewing court is whether in doing so the agency has acted reasonably* and thus has 'stayed within the bounds of its statutory authority.'

134 S. Ct. at 2439 (citing *City of Arlington, Tex.*, 133 S. Ct. at 1868) (emphasis added).

> Even under *Chevron* 's deferential framework, agencies must operate '*within the bounds of reasonable interpretation*.'

Id. at 2442 (citing *City of Arlington, Tex.*, 133 S. Ct. at 1868) (emphasis added).

> EPA's interpretation is also *unreasonable* because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization.

Id. at 2444 (emphasis added).

> Since, as we hold above, the statute does not compel EPA's interpretation, it would be patently *unreasonable*—not to say outrageous—for EPA to insist on seizing expansive power that it admits the statute is not designed to grant.

Id. (emphasis added).

CERCLA §107(a)(4) provides that PRPs "shall be liable for—(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan…." As we previously noted, the NCP contains numerous provisions requiring reasonable consideration of cost in the remedy selection process. However, EPA did not define or even mention the recovery of "oversight costs" in the NCP. The government's argument appears to be that since the statute allows it to recover all costs of response "not inconsistent with the national contingency plan" and EPA's NCP has no reference to "oversight costs," no oversight costs are inconsistent with the NCP. Or to put it more bluntly, there is no limit on how much of other people's money EPA can spend and then recover. Using EPA's silence in the NCP as a basis for unlimited recovery of "oversight costs," no matter how frivolous and irresponsible, is not itself a reasonable agency interpretation of the statute. Moreover, EPA's interpretation of CERCLA§107(a) that there is no reasonableness limit on its "oversight costs" has not been adopted pursuant to notice and comment rulemaking. It thus does not carry the force of law and is not subject to *Chevron* type judicial deference. *See United States v. Mead Corp.*, 533 U.S. 218 (2001). A court may, of course, give some weight to EPA's interpretation:

> depend[ing] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). *See also Mead Corp.*, 533 U.S. at 235.

It is particularly telling that, as discussed above, even under the more favorable to the Agency standard of *Chevron* deference, the U.S. Supreme Court has ruled that a reasonableness standard applies. Therefore, *a fortiori* a reasonableness standard is also applicable to EPA's position regarding its "oversight costs," which would not be accorded *Chevron* deference by a court.

Congress clearly intended that cost recovery would be limited to costs "not inconsistent with" something it thought would be in the NCP. Otherwise, the words Congress used are stripped of any meaning. EPA's interpretation that leaving its NCP silent on "oversight costs" means that once it selects a remedy there is no limit on the oversight costs it can recover, is not a reasonable construction of the statute. Having failed to provide a reasonable construction of the statute, courts will need to give effect to Congress' intent that there be some limit on EPA's recovery of costs. To put it another way, the combination of the refusal of EPA to promulgate any standards in the NCP regarding what oversight costs are reasonable *and* the recent Supreme Court decisions requiring agency interpretations of a statute to be "reasonable," fundamentally undermines EPA's position.

Statutes are not to be read to render language in them mere "surplusage." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (" '[A] statute ought, upon the whole, to be so construed that,

if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant'") (quoting *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879)). Yet that is exactly what EPA's interpretation leads to. If EPA is correct, the phrase costs "not inconsistent with the national contingency plan" applies to nothing and has no meaning. It is unlikely that the courts would sustain that position in light of the recent Supreme Court cases.

2. EPA's Dispute Resolution Process Violates Due Process

The Trustees also object to EPA's demand for oversight costs because, among other things, the system under the Third Site 2002 AOC to dispute any of the demanded oversight costs inherently deprives the Non-Premium Respondents of property without Due Process of law in violation of the Fifth Amendment of the Constitution of the United States.

The Third Site 2002 AOC requires the Trustees to object in writing to any EPA action taken pursuant to the 2002 AOC. (2002 AOC, Section VIII). After written objections are submitted, the Trustees and the EPA enter into a "Negotiation Period" when they attempt to resolve the dispute through formal negotiations. *Id.* If the parties are unable to reach an agreement, the EPA issues a written decision on the very dispute to which it is a party. That decision then becomes incorporated into and an enforceable element of the 2002 AOC. *Id.*

Under this system, EPA decides its own fate and is the ultimate decision-maker of its own entitlement to collect money. The Trustees on behalf of the Non-Premium Respondents are deprived of the opportunity to conduct discovery or cross-examine witnesses before an impartial fact finder in order to fully develop its objections and defend against the EPA's counter-arguments.

"[I]t is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, 2259 (2009) (*quoting In re Murchison,* 349 U.S. 133, 136 (1955)). As described, the dispute resolution process mandated by the Third Site 2002 AOC provides that EPA, one of the parties to the dispute, issue the final decision on the dispute.

"[D]ue process requires a 'neutral and detached judge in the first instance' . . . ." *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 617 (1993) (*quoting Ward v. Village of Monroeville,* 409 U.S. 57, 61–62 (1972)); *see also Hamdi v. Rumsfeld,* 542 U.S. 507, 533 (2004) (same). *See also Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). The dispute resolution process does not provide the Trustees with a fair tribunal to decide the validity of its objections.

That same element of coercion without due process was before the court in *Tennessee Valley Authority v. Whitman*, 336 F.3d 1236 (11th Cir. 2003). The Eleventh Circuit found that the EPA's compliance order provision in the Clean Air Act ("CAA") to be an unconstitutional violation of due process. In that case, the EPA had issued an administrative compliance order

("ACO") under the CAA. The court recognized the ACO had the status of law independent of the statute, and that severe civil and criminal penalties could be imposed for noncompliance with the ACO, also independent of the statute. The court noted that "the problem with ACOs stems from their injunction-like legal status coupled with the fact that they are issued without an adjudication or meaningful judicial review."[1] *TVA v. Whitman*, 336 F.3d at 1241. The court further held that:

> Before the Government can impose severe civil and criminal penalties, the defendant is entitled to a full and fair hearing before an impartial tribunal "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). . . . [T]he scheme enacted by Congress deprives the regulated party of a "reasonable opportunity to be heard and present evidence" on the two most crucial issues: (a) whether the conduct underlying the issuance of the ACO actually took place and (b) whether the alleged conduct amounts to a CAA violation.

TVA v. Whitman, 336 F.3d at 1258.

It is no answer to say "you consented." That was also the case in *TVA v. Whitman*. And as in *TVA v. Whitman*, the scheme in place to dispute EPA conduct deprives the Trustees, on behalf of the Trust, the constitutional right to Due Process. This scheme "unconstitutionally delegates judicial power to a non-Article III tribunal," *id.* at 1259, and in this case, a non-judicial body that has a financial stake in the outcome.

Further, to the extent that the Non-Premium Respondents disagree with the EPA's final decision on the dispute and seek judicial review, they risk penalties of up to $27,500 per day under CERCLA § 106(b)(1), 42 U.S.C. §9601(b)(1) (Consent Order § X at 24-25) while judicial review is proceeding. Thus, in addition to the lack of a fair hearing, the Order attempts to coerce payment of money to EPA without Due Process by impeding judicial review. EPA *does* permit an impartial proceeding, including the right to call witnesses, for some disputes under Consent Orders, 20 C.F.R. § 22.1, but the resolution of oversight costs disputes or penalties under § 106(b)(1) are *not* included among them. *See id.*

3. Statute of Limitations

The staff has asserted that even if we are correct as to our interpretation of the Consent Order (which interpretation was basically confirmed by the decision of May 3, 2018), EPA could still collect what it refers to as its oversight costs by bringing an action under CERCLA 107 (42 USC § 9607). Although EPA has characterized the remedy as a "non-time critical removal action", we believe that a Court would conclude that the remedy at Third Site is a remedial action, not a removal action. Pursuant to CERCLA § 113(g)(2) "[a]n initial action for recovery

[1] Additionally, the court found that the procedures the EPA put in place to "reconsider" the ACO were also problematic, in part, because discovery was effectively unavailable. *Id.* at 1246.

of the costs referred to in Section 9607 of this title must be commenced ... (B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action ...." Since any such claim would be brought long after the statute of limitations has run, it would be time barred. We have reviewed the records in the Seventh Circuit litigation, *Patricia A. Bankert et al. v. Norman W. Bernstein and Peter Racher, as Trustees of the Third Site Trust Fund*, No. 13-568, and have concluded that there was no waiver of the statute of limitations defense.

Spreadsheet of Calculations (Attachment 1)

Without waiving our arguments that the dispute resolution provisions of the Order violate the Trustees' Due Process rights, in the attached spreadsheet we implement the non-constitutional objections to the bill for Third Site costs discussed in the portion of this letter that precedes the constitutional objections. The spreadsheet is set up as follows:

1. The top row of the spreadsheet includes all months in which EPA or EPA's contractors were performing activities covered by EPA's January 13, 2021 oversight costs bill.

2. The first column includes the following categories:

    a. Army Corps of Engineers Actions, Original Army Corps of Engineers Invoice Amount, Adjusted Army Corps of Engineers Invoice Amount, and Charges in Dispute, all applicable to EPA's current contractor, the Army Corps of Engineers;
    b. Linda Haile Payroll, Tom Krueger Payroll, Vanessa Mbogo/Simmons Payroll, Matt Ohl Payroll, Matt Ohl Travel Costs, Original EPA Payroll, and Adjusted EPA Payroll, all applicable to EPA's payroll costs; and
    c. EPA Net Adjusted Claim for Direct Cost, EPA Indirect Cost %, and EPA Indirect Cost Based on Net Adjusted Claim, for the adjusted claim amount. The indirect cost percentage that EPA applied to this bill is 79.65%.

3. We allocated the amounts set forth in EPA's bill to the months in which the activities took place. If there was no backup to a voucher and we were unable to determine the months in which the activities took place, we allocated the amounts to the month in which the voucher was dated. We used EPA's payroll calendar provided by Mr. Krueger to allocate EPA's payroll charges to the months in which EPA performed the activities.

4. We then applied the principles set forth above in the rows labeled Adjusted Army Corps of Engineers Invoice Amount, Adjusted EPA Payroll, Adjusted EPA Regional Travel Charges, EPA Net Adjusted Claim for Direct Cost, and EPA Indirect Cost Based on Net Adjusted Claim

5. The final column of the spreadsheet includes the total amount for each row. The final column also includes a total EPA Net Adjusted Claim, which is the sum of the EPA Net Adjusted Claim for Direct Cost and EPA Indirect Cost Based on Net Adjusted Claim.

Our spreadsheet indicates that the total EPA Net Adjusted Claim for the period November 6, 2019 through November 5, 2020 comes to $66,411.74. We will instruct our bank to pay that amount. The balance of $73,548.51 is disputed pursuant to Sections VII.E. and VIII. of the Consent Order and this letter, and is being placed in escrow pursuant to Consent Order Section VII.E. The Consent Order, vouchers and other documents referenced above will not be separately reproduced since they are voluminous and, having been produced or signed by EPA, are equally available to EPA.

Section VIII. of the Consent Order requires the parties to "expeditiously and informally" attempt to resolve any dispute that arises under the Consent Order. Accordingly, we request a telephone conference call at a mutually agreed time and date to review the disputed amounts in an effort to informally resolve this dispute.

Very truly yours,

/s/ Mary E. Desmond

Mary E. Desmond

cc: Norman W. Bernstein
Peter M. Racher
Trustees